THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

METRIS U.S.A., INC., METRIS N.V., METRIS IPR N.V., and 3-D SCANNERS LTD Plaintiff, v. FARO TECHNOLOGIES INC., Defendant,	))))))))))	Civil Action No.: 08-cv-11187(PBS)

DEFENDANT FARO TECHNOLOGIES INC.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND AN ADDITIONAL DEPOSITION RELATING TO CERTAIN ANTITRUST AND DAMAGES ISSUES AND REQUEST FOR ATTORNEYS FEES AND COSTS

(PUBLIC VERSION)

I. INTRODUCTION

Plaintiffs, Metris U.S.A., Inc. (now Nikon Metrology, Inc.), Metris N.V., and Metris IPR N.V. (now Nikon Metrology, N.V.), and 3-D Scanners Ltd. and counterclaim-defendant Nikon Corporation (collectively "Nikon") have, for several months now, refused to respond to basic discovery relating to damages and to Faro Technologies, Inc.'s ("Faro") counterclaims for antitrust violations. Despite withholding discovery, Nikon has moved for summary judgment against Faro's antitrust counterclaims. Accordingly, Faro must now move for an order compelling production of information that is clearly relevant to its counterclaims and to Nikon's pending motion for summary judgment. The documents and information sought in this motion are summarized as follows:

- All documents relating to the supply agreement between Nikon and Hexagon Metrology, Inc., the world's largest metrology company. The supply agreement and related documents are relevant to Faro's antitrust counterclaims and damages. Given that Nikon and Hexagon are two of the largest companies in the metrology industry, the supply agreement and related documents are relevant to such issues as Nikon's market share and market power.

- Documents relating to, and a deposition witness with knowledge of, a PowerPoint presentation describing Metris's and Nikon's predatory and monopolistic business practices. The PowerPoint presentation was apparently prepared and presented in public by Bar van Coppenolle, former CEO of Metris and current consultant to Nikon but was not produced by plaintiffs in this litigation. Rather, Faro recently discovered the presentation on the internet in August 2010. Faro now seeks drafts and communications relating to the presentation and a deposition of a witness with knowledge of the presentation.

- All documents relating to any purchase price allocation or other valuation of the patents in suit. Such documents include, without limitation, all financial reports, analyses, memoranda, calculations and/or correspondence which mention, refer or relate to the valuation and/or method(s) of valuation applied to the patents in suit by Nikon or any other entity. The limited discovery produced thus far indicates that Nikon has placed a value on the patents in suit that is far less than the damages they seek from Faro in this action, which is relevant to damages and the predatory nature of this lawsuit in violation of U.S. antitrust laws.

The discovery sought by this motion is clearly relevant to damages and Faro's antitrust counterclaims and should have been produced months ago. Faro has made repeated requests for the information, both during depositions and in letters to Nikon's counsel, and has made every effort to avoid involving the Court in what should be routine discovery matters. However, in a pattern that has persisted throughout this litigation, plaintiffs have engaged in obstructionist tactics and have forced Faro to seek relief from the Court. Therefore, Faro also seeks its fees and costs incurred in bringing this motion.

II. BACKGROUND

A. Faro's Counterclaims for Antitrust Violations

On August 31, 2009, this Court granted Faro's motion to amend its Answer to add counterclaims against plaintiffs for violations of the Sherman Antitrust Act, 15 U.S.C. §

1, et seq., and violation of Mass. Gen L. ch. 93A. Faro's counterclaims are based, *inter alia*, on evidence that the patents-in-suit were obtained through fraud on the Patent Office, that plaintiffs have continued to pursue this litigation against Faro while knowing that the patents-in-suit were fraudulently obtained, that plaintiffs' attempted enforcement of the fraudulent patents threatens to lessen competition in a relevant, antitrust market (i.e., laser scanners mounted on articulated arms), and that plaintiffs have market power, or a dangerous probability of achieving market power, in the relevant market.

B. Nikon's Assertion of the Fraudulent Patents

The evidence that the patents in suit were fraudulently obtained is a matter of record and is the subject of the ongoing bench trial before this Court. In sum, Faro alleges inequitable conduct because, *inter alia*, the asserted patents are based largely on technology that was actually invented and developed by Faro and shared with plaintiff 3-D Scanners during a joint development project in the 1990s. *See* Faro's Trial Brief for Bench Trial on Inequitable Conduct [Dckt. 229]. The evidence also shows that Mr. Crampton also concealed evidence relating to other prior developments of his alleged invention by third-party companies Kreon and EOIS. *Id.*

Stephen Crampton, the purported inventor of the asserted patents and principal owner of 3-D Scanners at the time, failed to disclose any of the information received from Faro to the Patent Office during prosecution of the asserted patents. *Id.* Indeed, Mr. Crampton failed to make any mention of Faro, or the joint development work with Faro, Kreon and EOIS, to the Patent Office or even to his U.S. patent attorney. *Id.* Rather, Mr. Crampton fraudulently applied for the patents-in-suit using technology received from Faro. *Id.*

Further, the facts show that the plaintiffs have instigated and maintained this litigation with knowledge that the patents-in-suit are invalid and unenforceable. [redacted] *Id.* Thus, the evidence shows that the plaintiffs are knowingly asserting these invalid and unenforceable patents against Faro. It is well established that such conduct violates the antitrust and unfair competition laws of the U.S. and the Commonwealth of Massachusetts. *See e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965); *see also Handgards, Inc. v. Ethicon, Inc.* (Handgards I), 601 F.2d 986 (9th Cir.1979).

C. Nikon's Market Power and Anticompetitive Scheme

In addition to the knowing assertion of the fraudulent patents-in-suit, the plaintiffs' own internal documents show that [redacted]

1. Crampton email

[redacted] *See* March 12, 2003 email, attached to the Declaration of William J. Cass ("Cass Dec.") as Exhibit 1.

[redacted] *Id.*

[redacted]

[redacted]

[redacted] Thus, plaintiffs' scheme to use the fraudulent patents for monopolistic and anticompetitive purposes was hatched even before the patents issued.

[redacted]

Cass Dec., Exh. 2, Bates Nos. M 0000358-359.

2. Metris PowerPoint presentations

Further, several PowerPoint presentations created by plaintiffs include statements that unmistakably establish plaintiffs' intent to use the fraudulent patents to gain market power, and to use that market power for anticompetitive purposes. For example,

[redacted] *See* Metris PowerPoint presentation, p. M89677, Cass Dec., Exh. 4. [redacted]

[redacted]

Now, yet another Metris PowerPoint has surfaced. *See* Cass Dec., Exh. 5. For reasons that are unclear, the PowerPoint was not produced by plaintiffs during discovery. Rather, Faro discovered it on the internet. The PowerPoint contains several statements that are relevant to Faro's antitrust counterclaims. For example, there is a slide entitled "Why Nikon needs Metris culture" which includes the following statement:

> Our cultures are complementary in the market place
> Nikon Instruments has a market share defending culture
> Metris has a **market share conquering** culture

See Cass Dec., Exh. 5, p. FAO-220754.

Faro produced the PowerPoint to plaintiffs on or about August 29, 2010. Upon reviewing the presentation, Nikon acknowledged that it was authored and publicly presented by Bart van Coppenolle (former CEO of Metris and currently a consultant to Nikon). Nikon agreed to produce an unnamed witness for a supplemental deposition on the presentation but with unreasonable limitations to which Faro could not agree.[1]

Accordingly, as discussed below, Faro seeks depositions of Bart van Coppenolle and Mr. Kenji Yoshikawa (Chairman of plaintiff Nikon Metrology NV), regarding the undisclosed PowerPoint presentation.

[redacted]

[1] Nikon offered to produce a witness for a telephone deposition of up to three hours, but only if Faro agreed to seek no further discovery, by motion or otherwise, related to the presentation, any related documents, or testimony from the witness. See September 17, 2010 letter from Attorney Gates to Attorney Cass, Cass Dec., Exh. 6. Obviously, Faro cannot agree to seek no further discovery without first hearing what the witness has to say. Plaintiffs' proposal is particularly unreasonable given that the additional deposition is necessary because they failed to produce the presentation during discovery.

[redacted]

[redacted]

III. ARGUMENT

A. The Requested Information Is Relevant and Discoverable Under The Liberal Standards of the Federal Rules

The Federal Rules of Civil Procedure provide for liberal discovery, in the interest of a just and complete resolution of disputes. *See Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422 (Fed. Cir. 1993). The prevailing standard for proper discovery is contained in Fed. R. Civ. P. 26(b), which allows for the discovery of relevant information, with relevance defined broadly to include requests for information that are "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). Rule 26(b) is to be broadly construed. *See Katz*, 984 F.2d at 424.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. Documents and Information Relating to the Undisclosed PowerPoint Presentation are Clearly Relevant and Discoverable

As discussed above, the Metris PowerPoint presentation that Faro discovered on the internet was not produced by plaintiffs, despite that fact that it was publicly presented in November 2009. The presentation includes several statements that are highly relevant to Faro's antitrust counterclaims. For example, there is a slide entitled "Why Nikon needs Metris culture" which includes the following statement:

> Our cultures are complementary in the market place
> Nikon Instruments has a market share defending culture
> Metris has a **market share conquering** culture

See Cass Dec., Exh. 5, p. FAO-220754. Clearly, Metris' admission that it has a "market share conquering culture" is relevant to its anti-competitive behavior in the market place as alleged in Faro's counterclaims. [redacted]

[redacted]

In addition, the presentation discusses the laser scanner/articulated arm market in general, the various participants in the market, and the impact of the economy on the sales of Metris. Clearly, the PowerPoint should have been produced after it was presented in November of 2009 (along with any drafts and information concerning the forum at which is was presented). If Nikon had produced the presentation in a timely manner, Faro would have questioned Nikon's witnesses about it during the normal course of discovery (Nikon's Rule 30(b)(6) witnesses, Messrs. Yoshikawa and Van der Elst, were deposed in February 2010 and Plaintiffs' expert on damages and antitrust issues was deposed in May 2010).

Now, Faro must take additional depositions due to Nikon's failure to produce this highly relevant document. Accordingly, Faro's motion to compel should be granted.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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2 [redacted]

3 [redacted]

[redacted]

For the same reasons as above, Faro is entitled to all of the underlying documents, work tables and/or accounting materials showing how Nikon arrived at its allocation of value for its intangible assets.

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(A)(2)

Faro certifies that, pursuant to Local Rule 37.1, it conferred with opposing counsel prior to filing the instant Motion but the parties were unable to resolve or narrow the issues.

RESPECTFULLY SUBMITTED,
FARO TECHNOLOGIES INC.

Dated: October 14, 2010

/s/ William J. Cass

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I hereby certify that a true copy of the above document was served upon the attorney of record for each party via the ECF website on the 14th day of October 2010.

/s/ William J. Cass
William J. Cass, Esq.